ILTA

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received
8-27-97 VLB

August 25, 1997

Minerals Management Service
Department of the Interior
381 Elden Street
Mail Stop 4700
Herndon, VA 20170-4817

Attention: Rules Processing Team

RE: Notice of Proposed Rulemaking on Oil Spill Financial Responsibility for Offshore Facilities

Dear Sir or Madam:

Enclosed is a copy of a letter we mailed to you on August 21 with our comments on the proposed rule referenced above.

On page 3, we noted we were enclosing a copy of comments we submitted to MMS in December 1993. Inadvertently that enclosure was not included with our letter of August 21. We are enclosing it with this letter.

We apologize for the oversight.

Respectfully submitted,

Brian Neville
Manager, Regulatory Affairs

John Prokop
President and Counsel

MC mmsencl.sam 8-25-97 pb

ILTA

(37)

8-27-97 VhB

August 21, 1997

Minerals Management Service
Department of the Interior
381 Elden St.
Mail Stop 4700
Herndon, VA 20170-4817

By U.S. mail and by facsimile to 703-787-1575

Attention: Rules Processing Team

In Re: Notice of Proposed Rulemaking on
Oil Spill Financial Responsibility for Offshore Facilities;
Federal Register, March 25, 1997, pp. 14052-14079,
Vol. 62, No. 57; RIN 1010-AC33.
Agency Contact: Ray Beittel, (703) 787-1591.

Dear Sir or Madam:

The Independent Liquid Terminals Association (ILTA) is pleased to submit comments on the Minerals Management Service (MMS) proposed rule and notice referenced above.

ILTA is an international trade association representing 88 Terminal Member companies engaged in the for-hire and proprietary storage of bulk liquids. In the United States, ILTA member companies operate more than 400 bulk liquid terminal and storage facilities and pipeline terminals in 44 states. Commodities stored at these facilities include chemicals, crude oil, and petroleum products. As companies that provide for-hire bulk liquid product handling and aboveground storage services, ILTA for-hire Terminal Members normally do not own, buy, sell, or trade the liquid commodities they handle and store.

Our concern with the proposed rule is that nowhere in it has the MMS explicitly stated that docks, piping, wharves, piers and other similar appurtenances that rest on submerged land and jut seaward of the coast line, or past the line of ordinary low water, or the state boundary, and are directly connected to

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a land-based (on-shore) facility, are not to be covered under the proposed rule as "off-shore facilities." We feel that in past comments to MMS on this issue, that industry, through case citations and other information, has established that such on-shore terminal docks are not "off-shore facilities" subject to the MMS financial responsibility regulations.

In reading the proposed rule, we believe MMS has reflected this position into the proposed rule language. The definition of a "Covered Offshore Facility" (COF) includes "any structure, group of structures . . . used for exploring for, drilling for, or producing oil (including storing, handling, transferring, or processing oil associated with such production activities) or used for transporting oil from such facilities." We are advised that structures that would be subject to the MMS regulations are only those that directly receive and store or transport Outer Continental Shelf Oil. Examples are:

COF Subject to MMS Financial Responsibility Rule - An offshore pipeline running from the Outer Continental Shelf and carrying oil produced there would be subject to MMS regulations requiring that pipeline to provide financial responsibility to cover a worst case discharge. (MMS jurisdiction on the pipeline would end onshore where the first cutoff valve on the pipeline is located.)

COF Not Subject to MMS Financial Responsibility Rule - A bulk liquid terminal transfer dock that rests on submerged land and juts seaward past the line of ordinary low water or the state boundary, and is directly connected to a land-based (on-shore) aboveground storage tank facility (by being on or contiguous with the on-shore facility's property, or being connected by piping or pipeline to the onshore facility). The facility receives crude oil and refined petroleum products from any and all sources of such petroleum, but only by tank ship and tank barge. [Even if the crude oil came from an Outer Continental Shelf (OCS) source, by having been loaded on a tank ship, an intervening event, the oil is not considered to have come directly from the OCS.]

ILTA would appreciate if the MMS would respond to our inquiry and request for an explanation in the preamble to the final rule. We believe an explanation should be provided for posterity. Considerable time and effort have been spent to clarify that such terminal docks are not subject to the rule. The intent of the rule should be clearly established so that future readers do not engage in expansive interpretations of the proposed definition of a Covered Off-shore Facility and argue that it covers piers, docks and other appurtenances connected to an on-shore terminal or facility.

In past discussions with MMS personnel, ILTA has received verbal assurances that piers and docks of on-shore terminals and facilities would not be subject to MMS financial responsibility jurisdiction under the Oil Pollution Act of 1990.

However, we are seeking written assurance from MMS that such docks and piers are considered an appurtenance to the onshore terminal or facility from which they originate, that they are not to be considered facilities "seaward of the coast line" or offshore facilities, and that they are not covered under the proposed rule. (ILTA initially brought this issue to the attention of the MMS in comments submitted on December 15, 1993. For your convenience, we attach a copy of those comments.)

We appreciate the opportunity to offer these comments. If you have any questions please call us at (202) 659-2301, or fax us at 202-466-4166.

Respectfully submitted,

J for BN

Brian Neville
Manager, Regulatory Affairs

John Prokop
President and Counsel

c: ILTA Board of Directors

Disk: JP's 1996-97 Regulations; Doc. 8-97-MMS.SAM

ILTA

(37)

8-27-97 VLB

December 15, 1993

Chief, Engineering & Standards Branch
Minerals Management Service
U.S. Department of the Interior
Mail Stop 4700 / 381 Elden Street
Herndon, Virginia 22070-4817

_In Re:_ Oil Spill Financial Responsibility
for Offshore Facilities (and Onshore Facilities) & Pipelines
58 _Fed. Reg._, No. 163, pp. 44797-99, August 25, 1993

Dear Minerals Management Service:

The Independent Liquid Terminals Association is an international association that represents 90 companies with more than 360 **domestic for-hire bulk liquid terminals that operate in 45 states,** Puerto Rico, and the District of Columbia. These companies range in size from very small companies with as few as 10,000 barrels of storage capacity to those with 5 million barrels or more of storage capacity.

Important Distinctions Between ILTA Member _"For-Hire"_ Terminals and Oil Industry _"Proprietary"_ Marketing Terminals

ILTA Member "for-hire" terminal operators do not own the oil in their terminals. They lease storage tank space to owners of oil, including to the Federal government. _"Proprietary" marketing terminal operators, on the other hand, own the oil in their terminals._ The important distinction here is that before "spill prevention" was an environmental concept, the legal and contractual concept of _"for-hire" storage imposed upon the "for-hire" terminal operator, "care, custody, and control" - - the responsibility to return to the product owner approximately the same amount of product as was placed into storage._

Another key difference is that the "for-hire" terminal is a service business -- it involves the leasing of storage tank space and the handling of liquid products for a fee. The "terminal and a tank" is the business; the better they are maintained and operated, the more marketable they are to quality conscious customers. In addition to auditing their own terminals, ILTA Member company terminals are regularly audited by their oil company and chemical company customers. For example, one ILTA Member company with a very high quality terminal has had 26 audits per year -- one every two weeks -- by different product owner storage customers -- to make sure it continues to meet high safety and environmental operating standards for valuable high quality products.

The "proprietary" terminal owned by the product owner is a cost to the product owner. The product is a commodity, oil. The "proprietary" terminal and transportation modes used to carry that oil are simply part of the distribution system necessary to get the oil to market so it can be sold -- the profit is in selling oil, not in leasing out storage space. _The profit to be made by the "proprietary" terminal operator in selling oil far exceeds by many times the profit that a "for-hire" terminal operator can make in leasing out storage tank space._ **That distinction between "oil marketers" and "for-hire" terminals is an important one for government regulators to keep in mind when imposing costly requirements.**

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JP/AmiPro/Reg.Com.II/Fin.Resp.

The Origin of Mandatory Financial Responsibility -- For Foreign-Flag Ships That Sailed Out of U.S. Jurisdiction

The concept of mandatory financial responsibility was created in the 1970's because some foreign-flag ships could intentionally or accidentally have a discharge in U.S. navigable waters and sail outside U.S. jurisdiction where they were free from U.S. prosecution for the costs of cleanup and damages. The Congress required foreign-flag ships to provide a "Certificate of Financial Responsibility" (COFR) as evidence that they had oil spill insurance in order to allow them to enter U.S. navigable waters, ports and harbors. This insurance coverage allowed the U.S. government access to cleanup funds even if a discharging foreign ship sailed out of U.S. navigable waters and even if it and its owner(s) were "physically" and "legally" outside U.S. jurisdiction. The same requirement was imposed on U.S. ships so as not to violate international maritime agreements and so as not to discriminate against foreign-flag vessels.

The reasons that the U.S. government did not impose mandatory financial responsibility on onshore facilities were several:

(1) Onshore facilities stay put -- they do not sail outside of U.S. jurisdiction;

(2) The benefits of certificating U.S.onshore facilities -- if any -- are miniscule; the benefits of not certificating them are tremendous, including eliminating substantial unnecessary, costly paperwork for the underwriters, the government, and the onshore facilities.

(3) Shoreside facility compliance with U.S. Coast Guard and U.S. EPA spill prevention requirements indicate that shoreside facilities have had very good operating records. A recent 4-year study of oil spills in the New York/New Jersey Harbor indicated that of the total volume of oil discharged in the harbor in that period, only 8% came from terminals. Four discharges from four facilities accounted for almost all of that 8%. **That meant that of the 96 terminals in the harbor, most had no spills at all or had a few relatively small spills.** Of the 96 terminals in the harbor, 62 of them participated in follow up audits by a private independent audit firm to determine how they could still further improve operations. **Please note that 92% of the oil discharged in New York/New Jersey harbor over this 4-year period came from sources other than onshore terminals!** Discharges from terminals in the Harbor have been reduced even more since the audit.

(4) The response and cleanup record of U.S. bulk liquid terminals to any discharges for which they may be responsible is very good.

(5) Should any problem arise with a terminal, under existing law, the federal government can take several courses of action, including severe ones of seizing the terminal property for unsatisfied debts, or shutting down a terminal that is unable to comply with spill prevention requirements.

Imposing mandatory financial responsibility certification on onshore facilities is an expensive way to cure a problem that does not exist!

JP/AmiPro/Reg.Com.II/Fin.Resp.

ILTA CONCERNS ABOUT THE CERTIFICATE OF FINANCIAL RESPONSIBILITY CONCEPT

1. The mandatory "Certificate of Financial Responsibility" (COFR) is a **"permit to operate."** Without it, a facility cannot operate and it must shut down.

2. **The insurance market is unpredictable.** Coverages available one day can disappear at policy renewal time. In the early 1970's, policies were issued every 3 years. With the advent of the oil pollution provisions of the Clean Water Act in 1972, oil spill coverage disappeared from insurance policy coverage. Many onshore facility operators were unaware of it.

3. **The insurance market is unconscionable.** In the mid- and late-1970's, when oil pollution coverage was restored to policies, policy renewal was changed to annual instead of every 3 years. Initially, the coverage had been removed for the benefit of the insurance companies, and it was reinserted for their benefit -- when they understood what the risk exposure was and what they estimated the premium should be in order to make a profit.

4. **There is no substitute for commercial insurance for most onshore facilities.** A professional review of alternative methods of providing oil spill coverage has indicated that there is no feasible substitute when the financial levels of coverage exceed the value of the business seeking the coverage.

   For example, **Self-Insurance is not a realistic concept**, particularly when the financial responsibility requested is in the amount of $150 million. Most onshore-facility companies do not have a net worth anywhere near that amount.

   That means that the **"other forms of evidence of financial responsibility"** referred to in the Oil Pollution Act of 1990 (such as Guaranty, Surety Bond, or Letter of Credit) **are similar to self-insurance** -- that is the onshore facility seeking the financial protection or coverage must back up any one of those documents with facility financial assets at least equal to the amount of financial protection or coverage being sought.

   Nor is a "Captive Insurance" program a feasible concept for most onshore facility groups. ILTA explored the feasibility of implementing such a program, but collectively we were unable to assemble the high initial amount of required capital and reserve funds.

For 16 years, we have conveyed this message to the Congress and state legislatures. For the foregoing reasons, ILTA opposes any enactment of a law or imposition of a regulation requiring mandatory acquisition of astronomically high levels of financial responsibility. Such COFR's are unobtainable. If available, they are unaffordable (the old adage -- "You can always buy $5 million in insurance coverage for $6 million.").The unpredictable and unconscionable international insurance market would hold the fate of U.S. onshore oil facilities in their hands -- and could charge a high premium because of the high artificial demand a U.S. mandatory COFR law or rule created.

Without a COFR, which is a permit to operate, U.S. onshore oil facilities would have to shut down. This is what happened when New York enacted such a mandatory requirement into its state oil spill law in the early 1980's -- and the state quietly had to amend its law 6 months later because N.Y. oil businesses could not afford or obtain the mandatory coverage.

CONGRESS DECIDED NOT TO IMPOSE MANDATORY FINANCIAL RESPONSIBILITY ON BULK LIQUID TERMINALS AND OTHER ONSHORE FACILITIES

The points made above were made to the U.S. Congress over the 14-year period in which the Congress considered national oil pollution legislation. The Congress concurred with these points in addition to concerns that were expressed to it by Federal agencies.

Basically, the Congress asked: "Why spend money to require mandatory certification of financial responsibility if we are not experiencing a problem in having onshore facilities pay for the cleanup costs and damages?" "Why finance a bureaucracy to handle and maintain all of this paperwork?" "Why use a system established to handle renegade foreign-flag vessel polluters when we are not having this problem with U.S. onshore facilities?" "Why establish an onshore facility certificate of financial responsibility program when we are not experiencing a problem with U.S. onshore facilities, and if we do, we have a variety of adequate legal remedies at hand?"

The Congress asked these questions and its decision was not to include mandatory financial responsibility requirements in the Oil Pollution Act of 1990 for onshore facilities.

THE OIL POLLUTION ACT OF 1990 AND CASE LAW BEAR OUT THAT MMS HAS NO JURISDICTIONAL OR LEGAL AUTHORITY TO IMPOSE MANDATORY FINANCIAL RESPONSIBILITY ON ONSHORE FACILITIES

Prior to the enactment of the Oil Pollution Act of 1990 (OPA '90), the ILTA and others discussed with the Congress the provisions of the law that the Minerals Management Service (MMS) is now relying on to declare that it has jurisdiction over all "onshore facilities that handle oil," as well as its traditional area of jurisdiction which is offshore facilities. The issue was raised with the Congress because the industry encountered a similar experience in the early 1980's in the state of California. A state agency with offshore jurisdiction, relied on the definition of "onshore facility" (the same in both the Federal Water Pollution Control Act and state water law) and attempted to extend its jurisdiction to onshore facilities by way of regulatory fiat. The state "offshore" agency was defeated in its effort to interpret that the definition of "onshore facility" gave it jurisdiction over "onshore" as well as "offshore facilities."

Because of the effort in California, and because OPA '90 included the FWPCA definition of "onshore facilities," ILTA discussed the matter in special separate meetings with counsel of the House Merchant Marine and Fisheries Committee, the House Public Works and Transportation Committee, and the U.S. Coast Guard. The matter was also discussed by telephone with Senate committee counsel.

In all instances, all the counsel advised ILTA that the definition was not to be interpreted to extend "offshore facility" requirements to "onshore facilities." In fact, ILTA discussed this issue with House Committee counsel early on in the legislative effort to enact OPA '90, and then again, later -- just a few weeks prior to passage of OPA '90. Both times, a few years apart, ILTA was advised that the requirements for "offshore oil facilities," particularly those imposing mandatory financial responsibility, did not apply to "onshore oil facilities." and was advised that "case law" supported this position.

Language was included in OPA's legislative history specifically to address this industry concern and to record the intent of the Congress. It states:

> [t]he terms "offshore facility," "onshore facility," . . . and "vessel" are restated verbatim from Section 331(a) [33 *USC* 1321(a)] of the FWPCA. . . . In each case, these FWPCA definitions shall have the same meaning in this legislation as they do under the FWPCA and shall be interpreted accordingly. ***To the extent that docks, piping, wharves, piers, and other similar appurtenances that rest on submerged land and that are directly connected to a land-based terminal are deemed to be part of an onshore facility under the FWPCA, they are likewise deemed to be part of an onshore facility under the Conference substitute.***
>
> [H.F. Conference Report No. 101-653, 101st Cong., 2nd Sess. 779-80 (1990) (emphasis added)]

Other organizations in their comments have already cited the principle federal case in support of this position. We too cite *Union Petroleum Corp. v. United States,* 651 F.2nd 734 (Ct. Cl. 1981). In that case, as you may already well know, the United States Court of Claims held that an onshore facility, as defined under the FWPCA, encompassed the plaintiff's entire oil terminal and distribution facility, **including the pipeline that ran to the pier**. The Plaintiff's terminal consisted of an "onshore facility, dock area, and the pipeline area that leads to the dock . . . ." (page 737)

The Court noted that the FWPCA broadly defines "onshore facility" and concluded that, "There is no doubt that under the definition, the Union Terminal, consisting in part of a transportation facility which includes loading racks for trucks and railroad tank cars, and a dock extending into Chelsea Creek for oil tankers, is an "onshore facility"." (page 742) Numerous other cases support the general understanding of courts that a dock or pier is considered an appurtenance to the shore from which it originates. See Cabin on the Ocean IV Homeowners Ass'n. v. City of Myrtle Beach, ____ F.Supp. ____, ____, No. CIV. A. 4:90-1411-2, 1993 WL 290295, at 2-3 (D.S.C. July 27, 1993) (discussing various cases holding that a pier is an appurtenance to shore-based realty).

Further indications that Congress did not intend to include onshore facilities in the jurisdiction of an "offshore-facility" agency appears in the "liability" provisions and "financial responsibility" provisions of OPA '90. Under the OPA '90 ***liability provisions***, Congress lists "responsible parties" as including **"vessels, offshore facilities, and onshore facilities."** Under the OPA '90 ***financial responsibility provisions***, the Congress lists "responsible parties" as including only **"vessels and offshore facilities."**

Proof that this was no oversight is indicated in all of the committee drafts of the oil pollution legislation that was considered by the involved congressional committees over the 14 years the Congress considered the legislation. The subject was considered, analyzed, reviewed, discussed, and commented on extensively. After serious deliberation, the Congress deliberately and specifically exempted onshore facilities from mandatory financial responsibility requirements for reasons set forth above.

Further, through the provisions of Part B of OPA '90; the Congress, the spill prevention and response agencies, and the industry embarked upon implementing an extensive spill prevention and response program. These measures are being developed and implemented today. Congress determined that investment of onshore facility effort and capital in this direction was a wiser way to employ these scarce resources.

Clearly MMS's position that its "offshore facility" jurisdiction extends to and encompasses "onshore facilities" for the purpose of imposing MMS's proposed mandatory financial responsibility requirement is clearly offbase and in contradiction with the express intent of Congress, the FWPCA, OPA '90, the legislative history of OPA '90, the decisions of courts as expressed in case law, and common sense.

THE SOLUTION CALLS FOR COMMON SENSE!

The common sense, of course, deals with the logistics and cost to the nation of the MMS proposal. If each of the minimum anticipated 14,000 "onshore facilities" actually were able to purchase the mandatory $150 million Certificate of Financial Responsibility for $300,000 (the minimum anticipated premium), the annual premium cost for these U.S. "onshore facilities" would be $4,200,000,000.

Of course, the more sound argument against this proposal is not the potential flow of capital from the U.S., but the fact that most of the 14,000 onshore facilities, including most bulk liquid terminals, will not be able to raise the capital to purchase the coverage if it were available, and, secondly, the coverage will not be available for most, if not all, U.S. onshore and offshore facilities.

Since most offshore facilities are small operators, they will not be able to purchase their permit to operate. Since they account for most U.S. oil production, and they will not be operating, the pipelines and tank vessels that move their crude oil will not operate either. The refineries that refine their oil will largely close. The onshore terminals that store the refined product will also shut down as will the refined product pipelines and the tankships, tank barges, tank rail cars, and tank trucks that move this product to market.

The U.S.would not be able to import oil either because the onshore terminals, pipelines, and modes of transportation required to receive and distribute this oil would not be able to afford the permit to operate. The MMS proposal is an obvious "lose-lose" proposal. Without any one to regulate, it would close down also. We need a positive "win-win" solution. MMS and the Congress should be able to provide it.

ILTA strongly believes that it is unnecessary for the Congress to reopen the Oil Pollution Act of 1990 to amendment to provide offshore facilities with the relief they need. This can be accomplished by MMS in its proposed financial responsibility regulations. In reviewing the law, we believe that the MMS does have the authority from Congress to exercise the discretion to make its proposed regulations both workable for and affordable to U.S. offshore facilities. We believe it is unnecessary to impose a maximum of $150 million insurance coverage on any or all U.S. offshore facilities, and that the mandatory financial responsibility that is being proposed can be set at levels that are fair, equitable, and affordable for each offshore facility.

None of the U.S. offshore facilities can afford to purchase the $150 million insurance coverage. To interpret Congress's OPA '90 mandate as one that these facilities have to comply with absolutely is to interpret Congress's mandate as an order to shut down U.S. oil production.

We think such an interpretation would be unconscionable with respect to the affected offshore operators, the subsequently affected onshore bulk liquid terminals, pipelines, refineries, and oil transport modes, and the hundreds of thousands of U.S. businesses that would have to stop operating because insufficient oil and petrochemicals were unavailable to produce products, run factories, heat homes, hospitals, and schools, and propel trucks delivering goods, and workers to their jobs. It is that simple! It is that critical!

If the ILTA is able to answer any additional questions on the impact that this proposed rule requiring $150 million mandatory insurance coverage on bulk liquid terminals would have on our bulk liquid terminal business, and on U.S. business in general, please feel free to call upon us. **This proposal threatens the very existence of the business engaged in by our Member companies and the more than 360 facilities they operate in the United States.**

Respectfully submitted,

John Prokop,
President and Legal Counsel

cc: ILTA Board of Directors

ILTA "Executive Summary"

WHY THE FEDERAL MANDATORY FINANCIAL RESPONSIBILITY REQUIREMENT IS UNNECESSARY FOR ONSHORE FACILITIES

1. The Congress created the "Certificate of Financial Responsibility" (COFR) to deal with the problem of ***foreign vessels that were discharging oil in U.S. waters and then sailing out of U.S. jurisdiction*** without paying for cleanup or damages. The Vessel "COFR" is:

   (A) a permit for foreign vessels to enter U.S. navigable waters;

   (B) a means of assuring access to funds, by way of insurance, to pay for cleanup costs from foreign vessels that intentionally discharge or accidentally spill oil in U.S. waters; and

   (C) ***a means of accomplishing this*** even though the ***vessel or its owner(s) are "physically" and "legally" outside U.S. jurisdiction*** and otherwise free of prosecution by the U.S. Department of Justice. U.S. flag-vessels had to be included to avoid charges of discriminating against foreign-flag vessels and violating international agreements.

2. ***U.S. Onshore Facilities do not sail outside of U.S. Jurisdiction.***

3. ***U.S. Onshore Facilities, if they do have discharges, pay for any cleanup and damages,*** and, in this respect, they have never presented a problem to the U.S. or state governments.

4. U.S. Onshore Facilities are subject to other federal and state laws and regulations, including ***being shut down if they do not comply with oil spill prevention laws.***

5. Establishing a Vessel "Certificate of Financial Responsibility" (COFR) program has been an ***expensive undertaking for the U.S. government***.

6. Establishing a similar "COFR" program for onshore facilities would be extremely expensive because ***there are far more onshore facilities than there are vessels.***

7. Further, ***establishing and maintaining a "COFR" program*** for onshore facilities would waste substantial commercial and government financial resources because it would be a "solution" to a problem that does not exist -- **the annual cost could exceed the annual cost of spill cleanup!**

8. Establishing a "COFR" program for Onshore Facilities in the amount of $150 million would result in the ***shutting down of many onshore facilities*** since underwriters and insurers indicate that the insurance coverage is not available in that amount or is unaffordable if available..

9. Enough ***investment capital*** now flees the U.S. from Onshore facilities to purchase their existing insurance and reinsurance coverages in the London market and other foreign markets. Imposing excessively high mandatory levels of financial responsibility will only exacerbate this flow of money, provided, once again, that the insurance coverages can be purchased.

10. If the minimum anticipated ***14,000*** Onshore Facilities were able to purchase (and could afford to purchase) a $150 million COFR for $300,000 each (the minimum anticipated premium), the ***annual premium cost for these U.S. Onshore Facilities would be $4,200,000,000.***

# # #

Independent Liquid Terminals Association, Ste. 650, 1133 15th St., N.W., Wash., D.C., (202) 659-2301

JP/AmiPro/RegComII/FinResp2